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No. 86-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLAY W. DIPPEL,
Appellant,

vs.

TACO BELL CORP.,
Appellee.

On Appeal From The Supreme Court of Missouri

MOTION OF APPELLEE TO DISMISS

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LISTING OF PARTIES

The parties named in the caption are the only parties to this action.

Pursuant to Supreme Court Rule 28.1, appellee Taco Bell Corp. identifies PepsiCo, Inc. as its parent company.

TABLE OF CONTENTS

	Page
Listing of Parties	i
Table of Contents	iii
Table of Authorities	iv
Argument	1
1. Jurisdiction by appeal under 28 U.S.C. §1257(2) does not lie because appellant failed to make any explicit claim in the state courts that Mo. Rev. Stat. §290.140 (1982), as applied, is repugnant to the Due Process Clause of the federal Constitution	2
2. The appeal lacks any substantial federal question because appellant had no vested right to an award of punitive damages prior to August 13, 1982, the effective date of the amendment to Mo. Rev. Stat. §290.140 (1982), which barred any award of punitive damages in actions involving the contents of a service letter, and the court below committed no error in applying this rule on the direct appeal of the case	4
Conclusion	8

TABLE OF AUTHORITIES

Page

Cases:

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 6, 7

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6

Eimer v. Texaco, Inc., 518 F.2d 807 (8th Cir. 1975) 5

Ettor v. City of Tacoma, 228 U.S. 148 (1913) 5, 6

Funkhouser v. J.B. Preston Co., Inc., 290 U.S. 163 (1933) 4

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Gibbes v. Zimmerman, 290 U.S. 326 (1933) 5

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 7

Hamling v. United States, 418 U.S. 87 (1974) 7

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) .. 7

Hanson v. Denckla, 357 U.S. 235 (1958) 2

Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 (1931) 5

Jefferson Disposal Company, Inc. v. Parish of Jefferson, Louisiana, 603 F. Supp. 1125 (E.D.La. 1985) . 5, 7

League v. Texas, 184 U.S. 156 (1902) 4, 5

New York Central R.R. Co. v. White, 243 U.S. 188 (1917) 6

TABLE OF AUTHORITIES (Continued)

Page

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 2

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 6

Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo. 1986) (en banc) ..... *passim*

Constitutional Provisions:

U.S. CONST. amend. XIV, §1 2

Statutes:

28 U.S.C. § 1257(2) 1,2,4

Mo. Rev. Stat. §290.140 (1982) ..... *passim*

Other Authorities:

Soebblig, *The Missouri Service Letter Statute Revisited,* 34 Journal of the Missouri Bar 80 (1978) 6

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MOTION OF APPELLEE TO DISMISS

Pursuant to Supreme Court Rule 16.1 (a) and (b), appellee Taco Bell Corp. moves to dismiss the instant appeal for lack of jurisdiction under 28 U.S.C. §1257(2), on the ground that appellant failed to make any explicit claim in the state courts that Mo. Rev. Stat. §290.140 (1982),[1] as applied, is repugnant to the Due Process Clause of the federal Constitution. In the alternative, pursuant to Supreme Court Rule 16.1 (b), appellee moves to dismiss the appeal for want of a substantial federal question, on the ground that appellant had no vested right to an award of punitive damages prior to August 13, 1982, the effective date of the amendment to §290.140, which barred any award of punitive damages in actions involving the contents of a service letter, and the court below committed no error in applying this rule on the direct appeal of the case.

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[1] Hereinafter, the statute will be referred to in text as §290.140.

ARGUMENT

1. Jurisdiction By Appeal Under 28 U.S.C. §1257(2) Does Not Lie Because Appellant Failed To Make Any Explicit Claim In The State Courts That Mo. Rev. Stat. §290.140 (1982), As Applied, Is Repugnant To The Due Process Clause Of The Federal Constitution.

Essential to this Court's appellate jurisdiction under 28 U.S.C. §1257(2) is a showing by appellant that he made an explicit insistence in the state courts that §290.140, as applied, is repugnant to the Due Process Clause of the federal Constitution, U.S. CONST. amend. XIV, §1. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562 n.4 (1980); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958). In this case, appellant wholly failed to make any such insistence. Accordingly, the appeal must be dismissed for lack of jurisdiction in this Court.

In neither of the only two instances below in which appellant made mention of the Due Process Clause did he make even a single reference to *any statute,* much less to §290.140. In each case, appellant asserted precisely the same claim:

> The *change of law* after argument of the instant case in the Court of Appeals constitutes a violation of the Due Process clauses of both the Constitution of the State of Missouri, Article I, Section 10, and the 5th and 14th Amendments to the Constitution of the United States of America in that it denies Plaintiff his adjudicated right of recovery with no opportunity whatever to address the issue on which he was denied recovery and the appellate court in this instance has become an advocate for Defendant and raised an issue waived and abandoned by Defendant in its appeal.

Appellant's Application For Rehearing or in the alternative Transfer To The Supreme Court, ¶3; Appellant's Application For Transfer To The Supreme Court, ¶4 (emphasis added).

Undoubtedly, the "change of law" referred to by appellant was the decision by the Missouri Supreme Court in *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986) (en banc),[2] which the court of appeals below found dispositive of this appeal. App. 28. For example, in his questions presented and throughout his jurisdictional statement, appellant repeatedly criticizes the *Vaughan* decision and particularly that portion in which the Missouri Supreme Court rejected contrary intermediate appellate court opinions upon which appellant relied below. Jurisdictional Statement, 1, 17, 21, 23-24. Yet, appellant's criticism of the Missouri Supreme Court's rejection of those cases is not tantamount to an explicit insistence that any portion of §290.140, as applied to him, is unconstitutional.[3] In any event, this Court should not be forced to speculate what appellant meant by that phrase in determining whether it has jurisdiction over this appeal.

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[2] In *Vaughan*, it was held that a plaintiff seeking punitive damages based upon the contents of a service letter could not recover such damages when the case was filed prior to August 13, 1982, the effective date of the amendment to §290.140, and no judgment was entered prior to that effective date. Regarding those lower court cases holding that the amendment did not preclude punitive damages in a suit commenced before the effective date of the amendment but in which no judgment had been entered, the court stated that they "should no longer be followed." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d at 661.

[3] Certainly, the Missouri Court of Appeals did not regard appellant's use of this phrase as any such insistence. That court did not purport to determine the constitutionality of §290.140, but merely applied the holding of *Vaughan* decision. App. at 28. Indeed, the opinion of the court nowhere suggests that it perceived appellant's objections to rest upon the more narrow question of whether the statute could be applied to his case without offending the Due Process Clause.

Accordingly, the appeal should be dismissed for lack of jurisdiction under 28 U.S.C. §1257(2) due to appellant's failure to insist before either the Missouri Court of Appeals or the Missouri Supreme Court that §290.140, as applied to him, is unconstitutional.

2. The Appeal Lacks Any Substantial Federal Question Because Appellant Had No Vested Right To An Award Of Punitive Damages Prior To August 13, 1982, The Effective Date Of The Amendment To Mo. Rev. Stat. §290.140 (1982), Which Barred Any Award Of Punitive Damages In Actions Involving The Contents Of A Service Letter, And The Court Below Committed No Error In Applying This rule On The Direct Appeal Of The Case.

Regardless of his failure to press before the courts below any claim necessary to support this Court's appellate jurisdiction, appellant now appears to set forth two separate constitutional objections to the judgment below. Although not made clear by his jurisdictional statement, appellant seems to claim on the one hand that the 1982 amendment to §290.140 could not be constitutionally applied to deny him the right to seek punitive damages in his then pending suit. On the other, appellant seems to claim that the application of the holding in *Vaughan* to his case by the court of appeals below, after the trial court entered a judgment in his favor allowing punitive damages, was similarly unconstitutional. Regardless of which of these theories appellant now seeks to advance, neither presents a substantial federal question.

This Court has emphasized that the mere retroactive application of a statute to pending civil litigation does not render it unconstitutional. *Funkhouser v. J.B. Preston Co., Inc.*, 290 U.S. 163, 167-68 (1933); *League v. Texas*, 184 U.S. 156, 161 (1902). This principle holds particular force with regard to statutory changes which merely affect the allowable remedy, for no one has a vested property right cognizable under the Due Process

Clause in any particular *form* of remedy. Such matters remain subject to legislative change. *Gibbes v. Zimmerman,* 290 U.S. 326, 332 (1933); *League v. Texas,* 184 U.S. at 161. Rather, all that is constitutionally required by the application of the statutory change to pending cases is that the parties are left with a substantial and efficient remedy. *Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Co.,* 284 U.S. 151, 159 (1931); *Ettor v. City of Tacoma,* 228 U.S. 148, 155 (1913); *Jefferson Disposal Company, Inc.,* 603 F. Supp. 1125, 1136 (E.D.La. 1985).

Missouri's courts have not failed to appreciate these principles. On the contrary, the Missouri Supreme Court in *Vaughan* expressly stated that:

> [T]he federal constitution [does not] prevent a remedial or procedural provision from being applied retroactively because "although a vested cause of action is property . . ., the [plaintiff] has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

Vaughan v. Taft Broadcasting Co., 708 S.W.2d at 660, *quoting, Gibbes v. Zimmerman,* 290 U.S. at 332.

In enacting the 1982 amendment to §290.140, the Missouri legislature carefully ensured that both a substantial and efficient remedy would be preserved for all litigants whose claims involve the contents of a service letter issued by the employer. All such litigants, while not permitted to recover punitive damages,[4] may

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[4] While no legislative history regarding the amendment is available, the basis of the legislature's decision to bar such an award is apparent. Early on, it was noted that the statute allowed "a discharged employee to merely present evidence to a jury disputing the reasons given him for discharge by his employer and, thereby, in effect, permit a jury to award actual and punitive damages for a job ill-performed by the employee." *Eimer v. Texaco, Inc.,* 518 F.2d 807, 810 (8th Cir. 1975)

(footnote continued)

recover compensatory damages for any actual harm suffered. §290.140(2) (1982). Such "make whole" relief surely constitutes the substantial and efficient remedy required by principles of due process. On the other hand, the denial of punitive damages, which are simply "private fines levied by civil juries," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), raises no constitutional issue. Such damages merely constitute a penalty, in which no one can claim a vested right. *Cf., Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

Nor is any substantial constitutional issue presented by virtue of the court of appeals' application of *Vaughan* to appellant's case while the case was on direct appeal to that court, notwithstanding the "change of law" decreed in *Vaughan*. In so doing, the court of appeals correctly relied upon a principle of Missouri law that where a change in the law occurs while a case is on direct appeal, the appellate court must decide the case on the basis of the law in effect at the time of its decision, App. 28, a principle which likewise has been well recognized in the decisions of this Court. *See, Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969).

It thus follows that, contrary to appellant's assertions, no one has a vested right to insist that a rule of law will remain unchanged for his benefit. *New York Central R.R.Co. v. White*, 243 U.S. 188, 198 (1917); *see also, Duke Power Co. v. Carolina*

(Bright J., concurring). Later observing that the prospect of winning a punitive damages award under the statute had caused "a wellspring of frivolous litigation," one author likewise concluded that "the statute is being used to an increasing extent to harass and intimidate employers and to lay the groundwork for litigation irrespective of the contents of [the] letter." Soebblig, *The Missouri Service Letter Statute Revisited*, 34 Journal of the Missouri Bar 80, 85 (1978). Such criticisms have particular significance to this case inasmuch as appellant incurred no actual damages whatsoever as a result of the service letter given to him. Jurisdictional Statement, 12.

Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978). This is true both after the suit has been filed and continues to be true until a final nonreviewable judgment is secured. *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986); *Jefferson Disposal Co. v. Parish of Jefferson, Louisiana*, 603 F. Supp. 1125, 1137 (E.D.La. 1985); *cf., Hamling v. United States*, 418 U.S. 87, 102 (1974). Because appellant had no vested right to insist upon the continued validity of those intermediate appellate court decisions holding that pending suits seeking punitive damages were not affected by the 1982 amendment to §290.140, the court of appeals below was constitutionally free to apply the contrary holding in *Vaughan* during its review of the case on direct appeal from the trial court.

Certainly, there may exist an equitable exception to the application of these principles in certain cases so as to prevent "manifest injustice," *Bradley v. Richmond School Board*, 416 U.S. at 717, but this exception does not reach private civil suits where the intervening change in law does not extinguish a cause of action. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981). Here, the change in law does not extinguish or even hinder any litigant's filing of a cause of action under §290.140, but merely precludes the imposition of one form of remedy — punitive damages — in cases involving the contents of a service letter. Indeed, a decision by the court of appeals failing to apply *Vaughan* to this case itself would have perpetrated manifest injustice because such a failure would have permitted plaintiff to recover precisely what the Missouri legislative decided to bar - a windfall award. *Id.*

Accordingly, the court below did not constitutionally err in applying the *Vaughan* holding to appellant's case while on direct appeal to that court.

CONCLUSION

For the foregoing reasons, appellee Taco Bell Corp. respectfully urges this Court to dismiss the appeal for lack of jurisdiction or, in the alternative, for want of a substantial federal question.

Respectfully submitted,

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